



The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

### ISSUES

- (1) What is the nature and extent of claimant's injury and disability?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury to her right upper and lower extremities on October 3, 1991, while attempting to assist a lady out of a wheelchair. At the time of the incident, claimant felt a snap in her right shoulder, neck and hip, later developing problems in her head and right arm.

Claimant admits to having preexisting conditions as early as 1987, but advises her pain was tolerable. Claimant alleges the injury in 1991 led to extreme pain in her low back, stress into her legs and hips with any kind of movement, pain in the shoulders, numbness in the arms and loss of grip. Claimant was examined and treated by a multitude of doctors. Dr. Vito Carabetta, a board-certified physiatrist, saw claimant for electrodiagnostic studies on December 13, 1991, and then had claimant referred back to him as a primary care physician in March 1992. He did extensive examinations of claimant on more than one occasion, diagnosing preexisting fibromyalgia or myofascial syndrome, terms he considers synonymous. He assessed claimant a three percent (3%) whole body functional impairment rating as a result of his findings and found nothing in his examinations consistent with any need for work restrictions. After reviewing the medical records from the K.U. Medical Center, Dr. Carabetta indicated claimant suffered preexisting symptomatology before the October 1991 injury date. He felt claimant had returned to her baseline, meaning the October 1991 incident was a temporary aggravation only, as he found the same symptomatology in March 1992, as was indicated in the K.U. medical records prior to October 1991.

Claimant was examined by Dr. Arthur Dick, a neurologist, at the request of claimant's attorney. Dr. Dick found give-way weakness, a slightly abnormal pinprick, non-physiologic and exquisite tenderness to light touch all over her entire upper back. This finding could not be explained neurologically. The MRI of claimant's cervical spine was normal. He assessed claimant a five percent (5%) permanent partial disability to the body as whole on a functional basis, and restricted claimant to occasional lifting, less than one-third ( $\frac{1}{3}$ ) of the time, up to ten (10) pounds with no heavy lifting or pulling. He felt these restrictions to be permanent.

During cross-examination Dr. Dick was provided medical records from the K.U. Medical Center indicating that claimant was at the K.U. Medical Center complaining of severe right shoulder pain, during manipulation, as well as pain in her right hip and low back in August 1991. Dr. Dick agreed claimant had had these ongoing symptoms for years. His ten (10) pound weight restriction was based upon claimant's subjective complaints, as he was unable to uncover any objective neurological findings during this examination.

Claimant was examined and treated over a long period of time by Dr. Herbert Lindsley of the K.U. Medical Center. Dr. Lindsley, a professor in rheumatology and clinical immunology, is board certified in rheumatology, clinical immunology and internal medicine. He has been a practicing doctor and professor in rheumatology at Kansas University Medical Center since 1974. Claimant began treatment with the K.U. Medical Center in 1987 and was diagnosed originally with fibromyalgia. Dr. Lindsley describes fibromyalgia as musculoskeletal pain disorder with generalized aching of the joints and muscles. In 1988 claimant developed bursitis in her right hip which was successfully treated by injection. The claimant's generalized musculoskeletal pain continued. Claimant had, at various times, symptoms in her right shoulder, right hip, low back, cervical spine and right upper extremity. Claimant was treated in August 1991 for symptomatology similar to that above described. When asked to compare claimant's symptomatology in August 1991 to that found in February 1992, Dr. Lindsley found the claimant's right shoulder seemed to be less prominent in February 1992 but, other than that, objectively there appeared to be no difference in claimant's symptoms.

The Appeals Board found it significant that while testifying, claimant suffered significant memory loss when asked about the multitude of preexisting complaints and preexisting treatments undergone at K.U. Medical Center. Claimant was also unable to identify by name any of the personnel with whom she worked while employed with respondent. This memory loss included the names of the two aids allegedly present while claimant suffered the injury in question in this matter.

K.S.A. 1991 Supp. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is on the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Special Administrative Law Judge, in the Award, found the medical testimony of Dr. Dick to lack credibility and found Dr. Dick's restrictions to be unreasonable. This finding by the Special Administrative Law Judge is supported by the evidence and the Appeals Board adopts same as its own. In examining the medical evidence of Dr. Carabetta and Dr. Lindsley, the remaining physicians to testify in this matter, the Appeals Board finds that claimant's restrictions as a result of the October 3, 1991 injury have not changed. At most, claimant has suffered a slight alteration in her functional impairment.

K.S.A. 1991 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

In reviewing the evidence and testimony of the vocational rehabilitation experts, Karen Terrill and Michael Dreiling, Rh.D, the Appeals Board further finds that as a result of this injury, claimant has lost no ability to engage in work for wages comparable to the average gross weekly wage that the claimant was earning at the time of the injury on October 3, 1991. As such, the presumption of no work disability under K.S.A. 1991 Supp. 44-510e(a) has not been overcome and claimant is limited to her functional impairment.

Dr. Carabetta found claimant had suffered a three percent (3%) functional impairment as a result of the injury suffered on October 3, 1991. The Appeals Board finds this functional impairment rating to be credible and supported by a preponderance of the credible evidence and adopts same as its own.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey of June 9, 1994 shall be and is modified and claimant, Karen M. Brundige, is granted an award against respondent, Countryside Estates, and its insurance carrier, Travelers Insurance Company, (30%), and the Kansas Workers Compensation Fund, (70%), for a 3% permanent partial general body impairment of function. Based upon an average weekly wage of \$180.00 per week, claimant would be entitled to 26 weeks temporary total disability compensation at the rate of \$120.01 per week, in the sum of \$3,120.26, followed by 5 weeks temporary partial disability compensation at the rate of \$112.51 per week, in the sum of \$562.55, followed thereafter by 384 weeks of compensation at the rate of \$3.60 per week, in the sum of \$1,382.40 for a total award of \$5,065.21.

As of May 12, 1995, there would be due and owing claimant 26 weeks of temporary total disability compensation at the rate of \$120.01 per week followed by 5 weeks of temporary partial disability compensation at the rate of \$112.51 per week or \$562.55, followed by 157.14 weeks of permanent partial disability compensation at the rate of \$3.60 per week in the sum of \$565.70, for a total of \$4,248.51 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$816.70 is to be paid for 226.86 weeks at the rate of \$3.60 per week, until fully paid or until further order of the Director.

Future medical benefits will be awarded upon proper application to and approval by the Director.

The Appeals Board further finds claimant entitled to unauthorized medical expense of up to \$350 upon presentation of an itemized statement.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees and expenses necessary to defray the expense of the administration of the Workers Compensation Act are assessed thirty percent (30%) against the respondent and its insurance carrier and seventy percent (70%) against the Kansas Workers Compensation Fund per the agreement of the parties to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Delmont Reporting Services Transcript of Regular Hearing	\$ 82.35
Deposition of Karen Terrill	\$171.45
Hostetler & Associates, Inc. Deposition of Arthur R. Dick, M.D.	\$346.85
Deposition of Vito J. Carabetta, M.D.	\$195.70
Deposition of Herbert Lindsley, M.D.	\$418.90
Deposition of Michael J. Dreiling, Rh.D.	\$334.15
Patricia K. Smith, CSR  Deposition of Karen Brundige	\$259.70

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Fred Spigarelli, Pittsburg, KS  
Leigh C. Hudson, Fort Scott, KS  
Timothy Clover, Chanute, KS  
William F. Morrissey, Special Administrative Law Judge

**KAREN M. BRUNDIGE**

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**DOCKET NO. 162,187**

George Gomez, Director **ENDFIELD**